



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

July 1, 2003

Ms. Julie Joe
Assistant County Attorney
County of Travis
P. O. Box 1748
Austin, Texas 78767

OR2003-4511

Dear Ms. Joe:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 183603.

The Travis County Sheriff's Office (the "sheriff") received a request for documents pertaining to a specified internal affairs investigation. You claim that the requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.101, 552.108, and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

You claim that portions of the submitted information contain medical record information that is subject to the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. The MPA provides that "a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter." Occupations Code § 159.002(b). However, we note in this instance that chapter 611 of the Health and Safety Code contains the more specific statute that applies to the documents that you claim are protected from disclosure under the MPA. Accordingly, we will address these documents under chapter 611 of the Health and Safety Code.

Chapter 611 provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) provides:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002. Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose,

evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. See Health and Safety Code § 611.001. Sections 611.004 and 611.0045 provide for access to mental health records only for certain individuals. See Open Records Decision No. 565 (1990). Based on our review of the submitted information, we find that these particular documents, as well as other portions of the submitted information, constitute mental health record information that is subject to chapter 611. However, it appears in this instance that the requestor is entitled to have access to this information as the patient about whom the information pertains. See Health & Safety Code § 611.0045(a). You do not inform us, and we cannot otherwise ascertain, whether any of the prohibitions against disclosure to the patient in section 611.0045 apply in this instance. Accordingly, we conclude that the sheriff must release this mental health record information to the requestor.

You claim that the remaining submitted information is excepted from disclosure pursuant to section 552.108 of the Government Code. Subsections 552.108(a)(2) and (b)(2) protect records pertaining to criminal investigations or prosecutions that have concluded in a final result other than conviction or a deferred adjudication. See Gov't Code § 552.108(a)(2), (b)(2). You state that the requested information pertains to a closed internal affairs investigation in which the requestor was alleged to have committed the criminal offense of tampering with a governmental record. You assert that the internal affairs investigation was, thus, also a criminal investigation. However, you also acknowledge that the submitted information was collected, created, or obtained during the course of the internal affairs investigation. Furthermore, you do not otherwise inform us that the submitted information is associated with any resulting criminal investigation or prosecution. After carefully reviewing your arguments and the remaining submitted information, it is apparent that all of this information was created for the sole purpose of conducting the internal affairs investigation. Because internal affairs investigations are administrative, as opposed to criminal, in nature, section 552.108 is generally inapplicable to such investigations. See *Morales v. Ellen*, 840 S.W.2d 519, 526 (Tex. App.--El Paso 1992, writ denied) (predecessor statute to section 552.108 not applicable where no criminal investigation resulted). Accordingly, we conclude that the sheriff may not withhold any portion of the remaining submitted information under section 552.108 of the Government Code.

You also claim that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.¹ Information must be withheld under the common-law right to privacy if it is highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person and of no legitimate interest to the public. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual

¹ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. See Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by the common-law right to privacy.

assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683. Based on our review of your arguments and the remaining submitted information, we find that portions of this information, which we have marked, are protected from disclosure under the common-law right to privacy. Accordingly, we conclude that the sheriff must withhold this marked information pursuant to section 552.101 in conjunction with the common-law right to privacy. We also find that the submitted audiotape contains several references to the types of information that are protected from disclosure under the common-law right to privacy. Because these references are so inextricably intertwined, we find that it would be difficult to edit the tape so as not to reveal this information. Accordingly, we conclude that the sheriff must withhold the submitted audiotape in its entirety pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.

Finally, you claim that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.117(2) of the Government Code. Section 552.117(2) excepts from disclosure a peace officer's home address, home telephone number, social security number, and information indicating whether the peace officer has family members, regardless of whether the peace officer made an election under section 552.024 or section 552.1175 of the Government Code. *See* Gov't Code § 552.117(2). Section 552.117(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, we conclude that the sheriff must withhold the information that we have marked pursuant to section 552.117(2). However, we also conclude that the sheriff may not withhold any section 552.117 information that is contained within the submitted information and which pertains solely to the requestor under section 552.117(2) of the Government Code. *See* Gov't Code § 552.023 (providing that individual has limited special right of access to information when only basis for excepting information from disclosure involves protection of same individual's privacy interest); *see also* Open Records Decision No. 481 (1987).

In summary, the sheriff must withhold the information that we have marked, as well as the entirety of the submitted audiotape, pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. The sheriff must also withhold the information that we have marked pursuant to section 552.117(2) of the Government Code. The sheriff must release the remaining submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

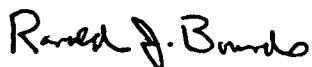
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 183603

Enc. Marked documents and submitted audiotape

c: Mr. Pete Mateo
c/o Julie Joe
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(w/o enclosures)